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July 14, 1993

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, DC 20554

Re: *In the Matter of Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Service Obligations*
MM Docket No. 93-25

Dear Mr. Caton:

Transmitted herewith for filing on behalf of GTE Spacenet Corporation are an original and required copies of its Reply Comments in the above-captioned matter. If there are any questions concerning this matter, please communicate directly with the undersigned.

Sincerely,

Terri B. Natoli

Terri B. Natoli

Enclosure

cc: Kathleen Levitz, Esquire
Cecily C. Holiday, Esquire
Rosalee Chiara, Esquire
Roy J. Stewart, Esquire
Andrew J. Rhodes, Esquire
All parties of record

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 25	)	
of the Cable Television Consumer	)	
Protection and Competition Act	)	MM Docket No. 93-25
of 1992	)	
	)	
Direct Broadcast Satellite	)	
Public Service Obligations	)	

REPLY COMMENTS OF GTE SPACENET CORPORATION

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SUMMARY

GTE Spacenet Corporation ("GTE Spacenet"), a Part 25 licensee of domestic-fixed satellites operating in the Ku-Band, hereby submits its reply comments to further support the view that Congress did not intend the Part 25 domestic-fixed satellite licensee ("Part 25 domsat licensee") to be subject to the DBS obligations contained in new Section 335 of the

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In the Matter of	)	
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Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 93-25
	)	
Direct Broadcast Satellite Public Service Obligations	)	

REPLY COMMENTS OF GTE SPACENET CORPORATION

GTE Spacenet Corporation, ("GTE Spacenet"), by its attorney, hereby submits its reply comments in the above-captioned proceeding and respectfully states as follows:

I. INTRODUCTION

On May 24, 1993, GTE Spacenet and approximately 20 other parties submitted comments to the Commission in response to its Notice of Proposed Rulemaking ("NPRM")[1] in the above-captioned proceeding, seeking to implement Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Pub. L. No. 102-385, 106 Stat. 1460 (1992). Section 25 adds a new section 335 to the Communications Act of 1934 ("the Act"), as amended, 47 U.S.C. 151 *et seq.* which imposes certain public interest obligations ("DBS obligations") on providers of direct broadcast satellite service ("DBS providers") operating in the 11.7-12.7 GHz frequency bands (Ku-band). The NPRM addressed numerous issues relative to implementing the DBS obligations imposed under new § 335, not the least of which involved identifying the "DBS provider" to be subject to § 335 under both Part 100 and Part 25 of the Commission's Rules ("definitional issue").[2] This identification process was

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1 8 FCC Rcd 1589 (1993).

2 *Id.*

necessary as a result of ambiguous language in the 1992 Cable Act with respect to Part 25 DBS providers.[3]

GTE Spacenet, a licensee and operator of Ku-band domestic-fixed satellites (domsat licensee or FSS licensee) authorized under Part 25 of the Commission's rules limited its initial comments solely to the definitional issue.[4] Specifically, GTE Spacenet addressed the question of whether or not Congress intended the Part 25 domsat licensee to be the "DBS provider" subject to the DBS obligations of new § 335 as a result of the fact that a customer or other user of its satellite capacity was providing direct-to-home broadcast service.

GTE Spacenet's comment endorsed the Commission's tentative conclusion that Congress did not intend the Part 25 domsat licensee to be the entity subject to the § 335 DBS obligations.[5] Rather, it is the entity responsible for the provision of video programming to the home viewer, i.e., the distributor/programmer, that is subject to new § 335. GTE Spacenet demonstrated, through reliance on the plain language of the 1992 Cable Act, its legislative history, and other related legislative acts and FCC proceedings, why this conclusion is the correct one. Moreover, GTE Spacenet explained the nature of FSS service provision, and how the imposition of the DBS obligations would significantly alter the well-established domsat industry practice of offering service, -- a result Congress could not have intended.

GTE Spacenet's understanding of Congress's intent under the 1992 Cable Act as to the entities subject to the DBS obligations under Part 25 is shared by the majority of other parties who addressed the definitional issue, expressly or implicitly, in their comments. In fact, only two commentors interpret the Act to require that the Part 25 domsat licensee be subject to the DBS obligations.[6] As GTE Spacenet will explain below, this interpretation appears to be based on an

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3 *See, e.g.*, § 335(b)(1) and § 335(b)(5)(A)(ii).

4 Comments of GTE Spacenet Corporation, MM Docket No. 93-25, May 24, 1993 ("GTE Spacenet Comments").

5 8 FCC Rcd at 1592.

6 Continental Satellite Corporation, one of the nine currently licensed Part 100 DBS licensees also supports the concept of imposing the DBS obligations of § 335 on a Part 25

incomplete understanding of the Part 25 licensing process and a very narrow reading of Section 25 the 1992 Cable Act.

II. MANY COMMENTORS CORRECTLY INTERPRET THE 1992 CABLE ACT TO EXCLUDE THE PART 25 DOMSAT LICENSEE FROM THE DBS OBLIGATIONS OF § 335

Several commentors, either expressly or implicitly, support excluding the Part 25 domsat licensee from the § 335 DBS obligations.[7] Like GTE Spacenet, they understand § 335 to apply to those users of a Part 25 domsat who themselves actually provide or distribute the programming directly to the home.[8] These commentors have a clear understanding of the way Part 25 domsat service is provided as well as the factors which differentiate Part 25 and Part 100 satellite licensees. For example, DirecTV, a Part 100 DBS licensee and corporate affiliate of a Part 25 domsat licensee Hughes Communications, Inc., explained in its comments how the Part 25 domsat licensee "normally has little control over the use to which the [domsat] capacity will be put,"[9] whereas the Part 100 DBS licensee "will be much more actively involved in programming decisions."[10] USSB, another Part 100 DBS licensee, while not expressly addressing the Part 25 licensees, explains the Part 100 DBS licensee's provision of service in a way which clearly permits one to distinguish between the Part 25 licensee and the Part 100 DBS licensee with respect to ascertaining the intent of Congress under the 1992 Cable Act regarding

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domsat licensee. Its position, however, it not based on interpreting Congressional intent as expressed in the 1992 Cable Act, but rather on its own policy reasons aimed at establishing a "level-playing field" between the provision of DBS service via Part 25 facilities and Part 100 facilities. Because the intent of the FCC's NPRM is to ascertain what Congress intended in enacting new § 335, not what various players in the DBS industry believe would be a fair and equitable FCC policy applicable to that industry, GTE Spacenet does not specifically address Continental's comments in its reply except to note that DBS service currently provided via Part 25 facilities is very different than that which will be provided via Part 100 facilities and therefore, there is no reason why these two services must be regulated similarly from a policy perspective.

7 *See e.g.* Comments of DirecTV, Inc. ("DirecTV Comment"), Comments of United States Satellite Broadcasting Inc. ("USSB Comments"), Comments of Satellite Broadcasting and Communications Association of America ("SBCA Comments"), and Comments of Consumer Federation of America ("CFA Comments").

8 *See, e.g.*, DirecTV Comments at 8; CFA Comments at 9; SBCA Comments at 9-10.

9 DirecTV Comments at 12.

10 *Id.*

the DBS obligations. At page 2 of USSB's comments, USSB describes the various types of DBS services that will be provided over its Part 100 satellites. Each of these types of services involves the Part 100 licensee, in one way or another, in the decision as to what type of programming will be received by the public e.g., "there may be advertiser-supported, subscription or pay-per-view channels programmed by DBS licensees; cable type program services for which the program provider obtains revenues on a mutually agreed to basis with the DBS licensee; and channels leased to programmers."[11] Furthermore, USSB admits that in its application for DBS authorization "USSB recognized its responsibility to provide public interest programming."[12] DirecTV similarly describes how it, the DBS licensee, seeks to

> ensure that quality non-commercial educational or informational programming is made available to consumers in the most efficient and economical manner possible, [and] also that such programming is actively promoted and packaged in a fashion that will increase its appeal and distribution to the widest possible spectrum of DirecTV's viewership.[13]

This admitted programming involvement by the Part 100 DBS licensee as an incident of holding the Part 100 license is in marked contrast to the nature of the video services provided by Part 25 domsat licensees. The Part 25 licensee, merely as an incident of holding the satellite license, is in no way involved in, interested in, or responsible for, the distribution of programming to the public.[14] It is the distributor/provider of DBS programming to the home, i.e., the user of capacity of a Part 25 domsat licensee upon which Congress intended to impose the DBS public interest obligations. These programming distributors are not synonymous with the Part 25 domsat licensee just because it is that domsat licensee's satellite over which the

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11 USSB Comments at 2.

12 *Id.* at 14.

13 DirecTV Comments at 2.

14 GTE Spacenet did point out in its initial comments at footnote 8 that a case may arise when a Part 25 licensee decides to become an active participant in direct-to-home program distribution. In such a case, GTE Spacenet agrees that the licensee would then be subject to § 335's DBS obligations - but those obligations would arise not as a result of holding the Part 25 licensee, but as a result of being involved in the distribution of the DBS programming and functioning as a DBS provider.

programming is transmitted. Not only has this distinction been clearly recognized by Part 25 and Part 100 satellite licensees, but by other key satellite industry participants as well.

The Consumer Federation of America (CFA), a coalition comprised of organizations representing millions of individual consumers (i.e., the public) explained in its comments why a Part 25 domsat is not a DBS distributor/provider under the 1992 Cable Act. Moreover, it explained why it is necessary and appropriate to impose the DBS obligations on the Part 100 DBS licensee but not the Part 25 licensee:

> This dichotomy is necessary and appropriate because of the different nature of the satellite and licensing process. Part 100 licensee [sic] were generally envisioned as video providers who will retain control of their satellite. Part 25 licensees would presumably be free to offer a variety of other services including voice and data transmission and may not actually be in control of the video transmissions.[15]

Similarly, the Satellite Broadcasting and Communications Association of America (SBCA), an association comprised of virtually all segments of the direct-to-home satellite industry including programmers, satellite operators, satellite and earth station manufacturers, and distributors and retailers of satellite hardware and program services, explains why the § 335 DBS public service obligations must fall on the distributor, i.e., the entity which controls the channels for distribution of program services.[16] This is so, according to SBCA, because otherwise imposing these obligations on the Part 25 domsat licensee "would wreak havoc on the other services which utilize the Ku-band transponders of a Part 25 licensee . . . not to mention the licensee itself."[17]

The foregoing comments lend additional support for the position GTE Spacenet strongly advocated in its initial comments -- that the Part 25 domsat licensee is not, nor could it logically

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15 CFA Comments at 4, nt. 5.
16 SBCA Comments at 6.
17 *Id.* at 10.

be, the entity under Part 25 upon which Congress intended to impose the DBS obligations of § 335.

III. NEW § 335 OF THE COMMUNICATIONS ACT DOES NOT REQUIRE THE FCC TO ESTABLISH NEW MONITORING OR ENFORCEMENT MECHANISMS

Although CFA agrees that the Commission should not impose the DBS obligations of § 335 on the Part 25 domsat licensee, it suggests that the Commission retain authority over the Part 25 licensee to order it "not to carry a service which fails to meet these [DBS] obligations."[18] GTE Spacenet strenuously disagrees. This exercise of authority over a Part 25 domsat licensee would involve many of the same problems that would exist if the Part 25 licensee itself were subject to the DBS obligations. It would place the Part 25 domsat licensee in a monitoring and enforcing mode over something for which it has no control. Additionally, it would require the licensee to inquire as to, or become involved in, the particular video distribution use that is being made of its satellite. GTE Spacenet specifically addressed this issue in its initial comments and explained why a domsat has no mechanism or ability to enforce these obligations.[19] GTE Spacenet did note, however, that as a condition of providing service over its satellites to any user, that user must agree, contractually, to abide by all applicable FCC rules and regulations. This puts the user on notice that it may be subject to certain FCC rules, and imparts in that user the responsibility to find out those rules and abide by them. While in many cases these users may not themselves be FCC licensees, and thus not susceptible to the FCC's license revocation process, to the extent that they violate the FCC rules or the Communications Act, the FCC retains forfeiture authority over them under § 501, § 502 and § 503 of the Act and §1.80 of its Rules, 47 C.F.R. § 1.80, as well as cease and desist authority under § 312(b) of the Act. The 1992 Cable Act did not instruct the Commission to establish new or ongoing monitoring mechanisms or enforcement programs under new § 335, beyond those mechanisms currently in place, to ensure that those subject to § 335 are in compliance. As such, to impose this burden on the Part 25

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18 CFA Comments at 4.

19 GTE Spacenet Comments at 8.

licensee would be both unwarranted under the 1992 Cable Act and unworkable from a practical perspective.

IV. THOSE PARTIES ADVOCATING THAT THE DBS OBLIGATIONS SHOULD BE IMPOSED ON THE PART 25 DOMSAT LICENSEE MISUNDERSTAND THE NATURE OF DOMSAT SERVICE PROVISION AND CONGRESSIONAL INTENT UNDER THE 1992 CABLE ACT

PRIMESTAR Partners L.P. ("PRIMESTAR"), is currently the primary (if not only) DBS provider operating on satellites licensed under Part 25 of the Commission's Rules.[20] PRIMESTAR is one of only two commentors that interpret § 335 to apply to Part 25 domsat licensees.[21] PRIMESTAR's interpretation is based on a narrow view of the way capacity is provided to users by Part 25 domsat licensees. PRIMESTAR's view, understandably, stems from the nature of its relationship with the Part 25 domsat licensee from which it receives its service. As GTE Spacenet explained in its comments, this does not reflect the way all domsat licensees provide service.[22] Even if it did, however, as long as the Part 25 domsat licensee is not involved in decisions as to what type of programming a DBS provider/user of its satellite was going to provide directly to the home, it would be inappropriate to impose the DBS obligations on the Part 25 licensee rather than on the DBS provider that is using that licensee's satellite capacity.

Unlike GTE Spacenet and most other commentors, PRIMESTAR takes the view that "providers of direct broadcast satellite service" under new § 335(a) of the Act are not the same entities as "providers of direct broadcast satellite service" under § 335(b). Under § 335(a), PRIMESTAR agrees with GTE Spacenet and others that it is the DBS provider, i.e., the programmer/distributor that is subject to the § 335(a) public interest obligations. However, under § 335(b) relating to obligations to carry non-commercial educational and informational

obligation should fall. GTE Spacenet finds it difficult to believe Congress intended such an incongruous result in the same section of the Communications Act aimed at regulating a single activity, i.e., direct broadcast satellite service, This is especially difficult to comprehend when the obligations associated with each of the two sections of § 335 involve the "DBS provider"

as used in § 335 (b)(1) is a phrase which is only used to apply to renewal authorizations for earth stations, *e.g.*, the Part 25 uplinker. 47 C.F.R. § 25.120(e). There is no provision in the Commission's rules for satellite authorization renewals. In fact, it is only recently that the FCC acknowledged that a domsat licensee had some replacement expectancy similar to renewal in an operational satellite.[25] That expectancy however can only be fulfilled through the filing of a new application for a new satellite. Thus, if the Commission chooses to follow PRIMESTAR's path of identifying the DBS provider under Part 25 based strictly on the words used by Congress in § 335(b), then it would still be inappropriate to apply the DBS obligations to the Part 25 domsat licensee because the domsat is not the only Part 25 licensed entity and the phrase "authorization renewal" is not a phrase which is descriptive of the satellite licensee. Instead, it would be the uplink earth station operator who is both "licensed under Part 25" (§335(b)(5)(A)(ii)) and subject to "initial authorization, or, authorization renewal" (§335(b)(1)) and would satisfy the specific description of the entity representing Congress's intent under PRIMESTAR's literal interpretation. Notwithstanding PRIMESTAR's attempt to glean the definition of Part 25 DBS providers under § 335(b) from Congress's express statutory language, GTE Spacenet has demonstrated that the language of the statute is too ambiguous to rely on exclusively, thus requiring resort to the legislative history.

Other commentors also find the express language of § 335 deficient in clearly defining the Part 25 entity subject to the DBS obligations. The Association of America's Public Television Stations (APTS) and the Corporation for Public Broadcasting (CPB) rely in their joint comments on the legislative history of the 1992 Cable Act to interpret § 335. Specifically, they cite H.R. 4850, the final House version of the Act, for the proposition that it is the Part 25 domsat licensee that Congress intended to regulate. It is significant however, that APTS/CPB's reliance on the legislative history of H.R. 4850 § 18(a)(4) to support their position fails to acknowledge

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25 *See e.g. In Re* American Satellite Company Application for Modification of License of the ASC-2 Satellite, *Order and Authorization*, 3 F.C.C. Rcd. 6969, para 11 (1988).

that the Section-by-Section analysis of § 18(a)(4) contained at page 124 of the House Report specifically and uncategorically states that:

> the requirements of subsection [18] (a)(4) [§ 335 (b)] are intended to apply only to direct broadcast satellite providers, which the Commission shall interpret to mean a person that uses the facilities of a direct broadcast satellite system to provide point-to-multipoint video programming for direct reception by consumers in their homes. The committee does not intend that the licensed operator of the DBS satellite itself be subject to the requirements of this

explained at length in its initial comments and in Section II herein, the domsat licensee "does not negotiate with programmers"; "controls" its transponders only to the extent that they are operated in accordance with the licensed parameters and intra/intersystem coordination agreements; and may not ever be aware (or need to be aware) that the capacity it has leased or sold to a customer is being used by that customer or that customer's customer for DBS service.

A Part 25 domsat licensee does not operate like a Part 100 DBS licensee -- it is licensed for a completely different purpose. To attempt to impose the DBS obligations of § 335 on Part 25 domsat licensees merely for the sake of consistent regulation[31] between these licensees and Part 100 licensees (as suggested by APTS/CPB) or because the Part 25 domsat licensee falls under the FCC's licensing jurisdiction whereas a potential Part 25 DBS provider/distributor may not, will do nothing to further Congress's goals under the 1992 Cable Act when the Part 25 domsat licensee is not involved in, nor has any control over, the programming subject matter which is at the heart of § 335. As GTE Spacenet indicated above, while the Commission may not have licensing authority over all DBS providers under Part 25 because they are presently not required to obtain a license if they use previously licensed facilities of a Part 25 domsat and a Part 25 uplinker, the Commission does possess forfeiture authority under 47 U.S.C. § 501, § 502 and § 503 of the Communications Act and §1.80 of its rules, as well as cease and desist authority under § 312(b) of the Act. GTE Spacenet submits that this authority is sufficient to provide the Commission with the necessary enforcement mechanisms over non-licensee DBS providers to ensure that they fulfill the obligations required of them under the Act.

V. CONCLUSION

In view of the foregoing reply comments, as well as its initial comments, GTE Spacenet urges the Commission to adopt its tentative conclusion that Congress did not intend the Part 25 domsat licensee to be subject to § 335's DBS obligations. This conclusion is supported by the

31 APTS/CPB Comments at 9.

nature of the domsat licensee's service offerings as well as the language and legislative history of the 1992 Cable Act.

Respectfully submitted,

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July 14, 1993

CERTIFICATE OF SERVICE

I, Raina N. Price-Webster, do hereby certify that a copy of the attached REPLY COMMENTS OF GTE SPACENET CORPORATION, which was filed with the Federal Communications Commission on July 14, 1993, has been served today via postage paid, regular mail to the recipients on the following pages.

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